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No. 06-394

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In the Supreme Court of the United States

SUZANNE FLIGIEL, M.D.,

Petitioner,

v.

ANTHONY J. PRINCIPI, in his capacity as Secretary, Department of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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NEW QUESTION PRESENTED

The government's reliance on the "harmless error" finding of the District Court to defeat the Petition for Certiorari presents a third question for the Court's consideration, one that requires the Court to determine whether this doctrine can be applied to a procedural error involving "root requirement" due process requirements mandated by statute.

PARTIES TO THE PROCEEDINGS

Petitioner is Suzanne Fligiel, M.D.

Respondent is Anthony J. Principi, in his capacity as Secretary, Department of Veterans Affairs

Individual Defendants Michael K. Samson, M.D., and all other individual defendants were dismissed by stipulation and order of the trial court.

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ARGUMENT

References to Pet. App. are to the appendix in the Petition for Writ of Certiorari.

The issue of whether violations of procedures mandated by statute can be waived under a harmless/prejudicial error analysis was briefed at the appellate level, but the panel did not reach the issue because it found a lack of jurisdiction. The government's Brief in Opposition assumes the correctness of the district court's holding.

Under the Department of Veterans Affairs Health-Care Personnel Act of 1991 (VAPA)(set out at Pet. App. K and L at 77a, 78a) before the agency may impose a "major adverse action" in the form of a disciplinary transfer on a tenured excepted service employee, 38 U.S.C. §§7401, 7461 (Id., at 77a), the agency is required to provide, (38 U.S.C. §7462 (b)(1), made applicable by 38 U.S.C. §7463(c)(1))-

> (A) At least 30 days advance written notice from the ...charging official specifically stating the basis for each charge, the adverse actions that could be taken if the charges are sustained, and a statement of any specific law, regulation, policy, procedure, practice, or other specific instruction that has been violated with respect to each charge...
> (B) A reasonable time, but not less than seven days, to present an answer orally and in writing to the ...deciding official...and to submit affidavits and other documentary evidence in support of the answer.

The district court found that no notice or opportunity to respond had been provided. (Pet. App. E at 49a) No appropriate administrative record existed. To support its

holding that the procedural omissions were harmless error, the court used the record created in the trial on the claims of gender discrimination and a failure to provide the required procedure.

At the appellate level petitioner's brief contended that the district judge had no authority to construct the agency's record for it and that the resultant conclusion of law was impermissible under *Securities and Exch. Comm'n v. Chenery,* 318 U.S. U.S. 80, 88 (1943)(court may not act as jury, court may not intrude upon the domain entrusted to an agency). Moreover, petitioner maintained that the trial record constituted an unacceptable basis for decision because the trial testimony was a "post hoc rationalization" since it was given almost four years after the major adverse action rather than as a "basis articulated in the order," citing *Burlington Truck Lines v. United States,* 371 U.S. 156, 169 (1962).

In addition, Petitioner relied on *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 546 (6th Cir. 2004) which stated:

> "A court cannot excuse the denial of a mandatory procedural protection [on harmless error grounds] simply because [as the agency urges] there is sufficient evidence in the record...and, thus, a different outcome on remand is unlikely...To hold otherwise, and to recognize substantial evidence as a defense to non-compliance with the [statute] would afford the [agency] the ability to violate the regulation with impunity and render the protections promised therein illusory."

Petitioner also cited *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-539 (1970) in the appellate brief where the Court, in a strong dictum, found "harmless error"

where there were challenges to procedures intended to facilitate the orderly transaction of business but carefully excluded rules "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." This dictum was converted into an explicit requirement for notice and an opportunity to respond in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) by its holding that the "root requirements" of due process of notice and an opportunity to respond can not be withheld. The fact that the requirements that petitioner claims are identical to the *Loudermill* "root requirements" but appear in a statute should not exclude them from review based on the statute.

The flaw in the government's Brief in Opposition is that it impermissibly elided the distinction between the review of fact questions and the review of procedure questions (5 U.S.C. 706(2)(A), (D) (Pet. App. I at 71a). How else can one explain the following statement in its brief, at 10, that "the availability of jurisdiction does not depend on the procedures that claimant allegedly received." Petitioner takes that to mean, in context, that one can't get jurisdiction based on procedural errors and that harmless error disposes of the non-existent challenge to the adverse personnel action. First, an objection to the use of the word "allegedly" - the trial court found that petitioner had received no notice or an opportunity to respond before the adverse personnel actions (Pet. App. E at 49a).

Second, a number of controlling Supreme Court precedents directly contradict the government statement in their holding that jurisdiction is available for procedural errors when substantive review is not. Petitioner cited *Lindahl v. Office of Personnel Management,* 470 U.S. 768 (1985) in its Petition to this court. In *Lindahl*, at 776, the

Court considered the claim of a civilian security guard that the Office of Personnel Management had impermissibly shifted the burden of proof of disability to him rather than requiring the agency to disprove disability under the circumstances of his case. Although the statute "thrice repeated in a single sentence" that the agency's decision on disability status was final (at 778, quoting from the Federal Circuit's en banc opinion that was reversed), the Court held, at 791, that review is available to determine whether 'there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination [citation omitted].'"

Lindahl is cited three times by the majority opinion in *United States v. Fausto*, 484 U.S. 439, 443, 450 and 451, and there is no indication that the earlier decision was to be limited in any way. Nor could there be because the facts of the two cases were very different- in *Fausto* the claimant sought to challenge the agency's substantive adverse decision by using another statute while in *Lindahl,* the claimant, like petitioner, challenged the failure to provide the procedures under the statute which governed the substantive decision.

Several other Supreme Court cases have found jurisdiction to review questions of law or procedure when the governing statute precludes substantive review of fact-based decisions. In *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 678 (1986), the court, in an 8-0 decision, held that jurisdiction was available to review the method by which payment amounts for medical services were calculated although review was precluded as to the actual amounts chosen. In *Oestereich v. Selective Service System Local Board 11,* 393 U.S. 233, 239 (1968), and *Leedom v. Members of the National Labor Relations,* 358 U.S. 184, 191

(1958), the court found jurisdiction to consider claims that alleged that the agency's action exceeded its authority although the respective agencies fact decisions were precluded from review. In *Leedom* it held that "[W]here, as here, Congress has given a "right" to the professional employees it must be held that it intended that right to be enforced and 'the courts...encounter no difficulty in fulfilling its purpose,' *Texas & New Orleans R. Co. v. Railway Clerks,* 281U.S. 548, 568 (1930).'" even though substantive review of the agency's decision was unavailable.

For the reasons given, petitioner believes that the government is without legal authority to elide §§706(2)(A) and (D) (Pet. App. I at 71a) and then to apply the doctrine of harmless error to the agency's adverse personnel decision. Given the legislative history described in the initial petition, at 10-16, and the cases cited here, federal courts have jurisdiction to review the denial of notice and an opportunity to respond under §706(2)(D) of the APA, although they may not grant review under §706(2)(A) for the actual personnel decisions of the VA. The denial of all statutory due process, because it deprived petitioner of rights characterized as "root requirements" in *Loudermill* and because it resulted in an agency decision without a proper record, are so serious that a court with jurisdiction ought to set aside the agency action as authorized by the APA.

A final word about the government's comment that remand would be an "idle and useless formality (citation omitted)" because the agency could simply do what it was required to do seven years ago and come to the same conclusion, at p. 12 brief in opposition. While it is true that laches is not a defense against the sovereign, *Costello v. United States,* 365 U.S. 265, 281 (1961), suggested a willingness to reconsider that principle if the government did

not meet the two requirements it set out and the application of the principle would not serve the policy underlying the principle.

In that case the government moved to revoke the citizenship of an individual 27 years after it was obtained on the grounds of fraudulent procurement. The court specified that it would "assume the applicability of laches," at 282, and then laid out the two required elements: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." More importantly, at 281, "the reason underlying the principle, said Mr. Justice Story, is 'to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers," citing *United States v. Hoar,* 26 Fed. Cas. 329,330 (No. 15,373).

It is difficult to conceive of a public policy that would be served by allowing an agency to violate a statute with impunity, in effect to operate as "basically lawless" as noted in *Osterreich,* at 237, where the court found jurisdiction to avoid that outcome. Petitioner also believes there is sufficient record evidence to establish the two elements required by *Costello.*

The government is misinformed in its assertion that "the most petitioner could ever obtain (Brief in Opposition at 12)" is the procedures she never got. Section 706 authorizes the court to "set aside agency decision...found to be (D) without observance of procedure required by law (Pet. App. I at 71)." This would void the agency's action (See *Londoner v. Denver,* 210 U.S. 373, 386 (1908)(assessment without proper process is "void"), would consequently require the agency to remove all references to the action from her file as requested and, in view of the agency's blatant disregard of the law,

should lead to her reinstatement (See *Franklin v. Gwinnett Cty. Pub. Sch*, 503 U.S. 60, 70-71 (1992)(federal courts free to fashion any appropriate relief, absent "clear direction to the contrary by Congress"), particularly in light of the trial court's finding that none of what happened had anything to do with petitioner's professional conduct or competence as a physician (Pet. App. E at 46a) and which was, in fact, outstanding over the course of her tenure as Laboratory Director as shown in trial testimony.

The government is also somewhat disingenuous in its assertion that "a remand would be unique to this case (Brief in Opposition at 12)." While this is always literally true, the Court's decision as precedent would discourage a repeat of this lawless behavior in any future major adverse actions in the population of over one million federal employees classified as non-preference excepted service employees (Petition at 8).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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